

FILED BY CLERK

MAR 19 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0387-PR
)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DAMIAN MITCHELL,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20050860

Honorable Charles S. Sabalos, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Petitioner

B R A M M E R, Judge.

¶1 Damian Mitchell petitions this court for review of the trial court's summary dismissal of his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb a trial court's ruling on a petition for post-conviction relief unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4,

166 P.3d 945, 948 (App. 2007). Mitchell was convicted after a jury trial of disorderly conduct, resisting arrest, and possession of a deadly weapon by a prohibited possessor. The trial court sentenced him to presumptive, concurrent terms of imprisonment, the longest of which was 4.5 years. We affirmed his convictions and sentences on appeal. *State v. Mitchell*, No. 2 CA-CR 2006-0380 (memorandum decision filed Nov. 29, 2007).

¶2 Mitchell filed a petition for post-conviction relief in June 2009, arguing his trial counsel had been ineffective for failing to call two witnesses “who could have exonerated [him]” and by not moving to sever the prohibited possession charge from the other charges. The trial court summarily dismissed the petition, concluding Mitchell had “fail[ed] to present a material issue of fact or law which would entitle [him] to relief.” *See* Ariz. R. Crim. P. 32.6(c). This petition for review followed.

¶3 In his petition for review, Mitchell argues the trial court erred in dismissing his petition for post-conviction relief without an evidentiary hearing because he had presented a colorable claim of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below prevailing professional norms and that the outcome of the case would have been different but for the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). “To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel,” a petitioner must present a colorable claim on both parts of the *Strickland* test. *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309

(App. 1996); *see also* Ariz. R. Crim. P. 32.6(c) (summary dismissal appropriate unless material issue of fact or law exists), 32.8(a) (defendant entitled to hearing if material issue remains). A colorable claim is “one that, if the allegations are true, might have changed the outcome.” *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶4 On review, Mitchell has abandoned his claim that his trial counsel had been ineffective for not calling two witnesses in his defense. He argues only that he had presented a colorable claim his counsel had been ineffective for failing to move to sever the prohibited possession charge from the other charges. *See generally* Ariz. R. Crim. P. 13.3, 13.4. As he did below, Mitchell asserts “[t]here is no meaningful issue” whether his counsel’s failure to move for severance fell below prevailing professional norms, noting that “[d]efense counsel normally file such motions routinely in this state and county.” But reviewing courts indulge “a strong presumption” that counsel provided effective assistance. *Strickland*, 466 U.S. at 689; *State v. Hershberger*, 180 Ariz. 495, 497, 885 P.2d 183, 185 (App. 1994). Merely because motions to sever commonly may be filed in other cases does not suggest trial counsel was ineffective in failing to so move under the facts of this case.

¶5 Mitchell provided nothing to the trial court by way of affidavits or other evidence to support his claim that his counsel should have filed a motion for severance. *See* Ariz. R. Crim. P. 32.5 (“Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to [the petition

for post-conviction relief].”); *see also State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (unsubstantiated claim witness would give favorable testimony does not compel evidentiary hearing); *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (App. 2000) (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements). Without more, Mitchell’s simple assertion does not overcome the presumption that his counsel provided effective assistance.

¶6 Moreover, the state argued below that Mitchell’s trial counsel’s decision not to move to sever the charges had been tactical. “Matters of trial strategy and tactics are committed to defense counsel’s judgment” *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988). “Actions which appear to be a choice of trial tactics will not support an allegation of ineffective assistance of counsel.” *State v. Espinosa-Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984). Our review of the record supports the state’s assertion.

¶7 Mitchell was arrested after fleeing a traffic stop in which he scuffled with police. A semiautomatic handgun was found in the pocket of a jacket he had left at the scene. Mitchell argues his trial counsel should have moved to sever the prohibited possession charge from the other charges because his prior convictions would not have been admissible at trial on the other charges, and evidence of his fight with the police officers would have been inadmissible at trial on the prohibited possession charge. But in support of Mitchell’s defense of mistaken identity, his counsel suggested to the jury that, once the officers determined Mitchell was “in the system” due to his prior felony

convictions and saw his associated photograph, all investigation ceased, and they assumed Mitchell was the same individual who had fled the traffic stop, despite the varying descriptions of the suspect. This argument strongly suggests Mitchell's counsel chose not to move for severance because she intended to rely on Mitchell's prior conviction to support her argument that the officers had arrested the wrong man.

¶8 Even if counsel's strategy proves ineffective, his or her tactical decisions normally will not constitute deficient performance; "disagreements [over] trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct had some reasoned basis.'" *State v. Vickers*, 180 Ariz. 521, 526, 885 P.2d 1086, 1091 (1994), *quoting State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987). Only if a decision is the product of "ineptitude, inexperience or lack of preparation," *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984), will the usual, "strong presumption" that counsel provided effective assistance potentially give way. *Strickland*, 466 U.S. at 689. Mitchell has not argued, much less demonstrated, that his trial counsel's tactical decision had no reasoned basis or was the product of ineptitude, inexperience, or a lack of preparation. *See Vickers*, 180 Ariz. at 526, 885 P.2d at 1091; *Goswick*, 142 Ariz. at 586, 691 P.2d at 677. Thus, he failed to assert a colorable claim of ineffective assistance of counsel, and the trial court did not abuse its discretion in summarily dismissing his petition for post-conviction relief. *See Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948.

¶9

Although we grant Mitchell's petition for review, we deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge